

1  
2  
3  
4  
5  
6  
7 LAURA DANA,  
8 Plaintiff,

9 v.  
10 THE HERSHEY COMPANY, et al.,  
11 Defendants.

Case No. [15-cv-04453-JCS](#)

**ORDER GRANTING MOTION TO  
DISMISS**

Re: Dkt. No. 22

12 **I. INTRODUCTION**

13 “The use of child slave labor in the Ivory Coast is a humanitarian tragedy.” *Doe I v. Nestle*  
14 *USA, Inc.*, 766 F.3d 1013, 1016 (9th Cir. 2014). The fact that major international corporations  
15 source ingredients for their products from supply chains involving slavery and the worst forms of  
16 child labor raises significant ethical questions. The issue before this Court, however, is whether  
17 California law requires corporations to inform customers of that fact on their product packaging  
18 and point of sale advertising. Every court to consider the issue has held that it does not. This  
19 Court agrees.

20 This is a putative class action in which Plaintiff Laura Dana claims that Defendants The  
21 Hershey Company and Hershey Chocolate & Confectionary Corporation (collectively, “Hershey”)  
22 violated California’s Unfair Competition Law (“UCL,” Cal. Bus. & Prof. Code §§ 17200–17210),  
23 Consumers Legal Remedies Act (“CLRA,” Cal. Civ. Code §§ 1750–1784), and False Advertising  
24 Law (“FAL,” Cal. Bus. & Prof. Code §§ 17500–17509) by failing to disclose on the packaging of  
25 Hershey’s chocolate products that some of the cocoa used therein originated at farms in Côte  
26 d’Ivoire (also known as the Ivory Coast) that use slave labor and the worst forms of child labor.

27  
28

1 Hershey moves to dismiss all claims. The Court held a hearing on March 18, 2016.<sup>1</sup> For the  
2 reasons stated below, Hershey's Motion is GRANTED, and this action is dismissed with  
3 prejudice.<sup>2</sup>

4 **II. BACKGROUND**

5 **A. Allegations of the Complaint<sup>3</sup>**

6 Côte d'Ivoire is the world's largest producer of cocoa beans, the raw ingredient for  
7 chocolate, and supplies 40% of global cocoa production and 47% of total imports to the United  
8 States. Compl. (dkt. 1) ¶¶ 19, 46. Slave labor and the worst forms of child labor are common in  
9 Ivorian cocoa production, as is well documented by United States government agencies, academic  
10 studies, nonprofit organizations, investigative journalists, and former laborers. *Id.* ¶¶ 5–8, 23–25,  
11 32–42. Children are frequently injured in the course of dangerous work involving machetes,  
12 chemicals, and heavy loads, and workers (both children and adults) may be beaten, whipped, and  
13 locked in to prevent escape. *Id.* ¶¶ 23–25. The Ninth Circuit has also acknowledged the existence  
14 of such conditions. *Id.* ¶ 26; *Doe I*, 766 F.3d at 1016.

15 Hershey is one of the largest chocolate companies in the United States and sells a number  
16 of popular chocolate products. *Id.* ¶ 3. In 2001, members of the United States chocolate industry  
17 including Hershey signed a voluntary protocol, negotiated by Representative Eliot Engel and  
18 Senator Tom Harkin, to develop standards for certifying chocolate produced without labor abuses.  
19 *Id.* ¶ 27. After failing to meet the initial 2005 deadline, the industry extended the self-imposed  
20 deadline to 2008, then to 2010, and then to 2020. *Id.* ¶¶ 29–31.

21 Despite adopting a “supplier code” that prohibits child labor and forced labor, and a  
22 “Corporate Social Responsibility Report” stating that “Hershey has zero tolerance for the worst  
23 forms of child labor in its supply chain,” Hershey sources much of its chocolate from Côte  
24 d'Ivoire through a multi-level supply chain of independent growers, cooperatives, distributors, and  
25

---

26 <sup>1</sup> The Court also heard argument in *McCoy v. Nestle USA, Inc.*, No. 15-cv-4451, which  
27 involves different parties but substantially similar claims and arguments. A separate order has  
been published concurrently in that case.

28 <sup>2</sup> The parties have consented to the jurisdiction of the undersigned magistrate judge for all  
purposes pursuant to 28 U.S.C. § 636(c).

<sup>3</sup> Dana's allegations are taken as true in the context of a motion to dismiss.

1 other intermediaries. *Id.* ¶¶ 4, 11, 20, 45, 47–51, 52. “Hershey acknowledges . . . the child and  
2 slave labor in its Ivorian supply chain,”<sup>4</sup> but does not disclose the existence of those labor abuses  
3 on its product labels. *Id.* ¶¶ 21, 22, 48, 50.

4 Dana “has purchased Hershey Chocolate Products at various retail stores including Target  
5 and Walmart in Brentwood and Antioch, California from 2011 through 2014.” *Id.* ¶ 13. Citing  
6 studies showing that consumers will pay a premium for ethically produced coffee, clothing, and  
7 seafood, *id.* ¶¶ 55–59, Dana alleges that she and other customers “would not have purchased  
8 Hershey Chocolate Products or paid as much for them” if Hershey had disclosed labor violations  
9 on the product labels. *Id.* ¶ 10, *see also id.* ¶¶ 60, 95, 106.

10 The Complaint includes three claims, under the UCL, the CLRA, and the FAL,  
11 respectively. The UCL claim is based on three separate theories arising from Hershey’s failure to  
12 disclose labor abuses in its supply chain on the packaging of its chocolate products: (1) the  
13 omission is “unlawful,” because it violates the CLRA, *id.* ¶ 74; (2) the omission is “unfair,”  
14 because the abusive labor practices themselves are immoral and the failure to disclose them  
15 impairs competition and prevents consumers from making informed decisions, *id.* ¶ 75; and (3) the  
16 omission is “fraudulent” because it is likely to deceive a reasonable consumer and the true facts  
17 would be material to reasonable consumer, *id.* ¶ 76. The CLRA claim asserts that Hershey’s  
18 failure to disclose labor abuses in its supply chain constitutes a misrepresentation of the “source,  
19 characteristics, and standard” of the products. *Id.* ¶ 91, *see also id.* ¶¶ 88–90 (citing Cal. Civ.  
20 Code § 1770(a)(2), (5), (7)). The FAL claim asserts that Hershey had a duty to disclose the labor  
21 abuses in its supply chain because it had superior knowledge as compared to customers, and  
22 because it made “partial representations and/or misrepresentations to the contrary.” *Id.* ¶ 102. In  
23 her Opposition, Dana disclaims any theory of an obligation to disclose arising from partial  
24 misrepresentations. Opp’n (dkt. 25) at 13 n.58.

25  
26  
27 <sup>4</sup> Certain Hershey products, sold under the brand names Bliss, Dagoba, and Scharffen Berger,  
28 are certified by the Rainforest Alliance (a nongovernmental organization) as using ethically  
produced cocoa and are not at issue in this case. Compl. ¶ 49.

**1           B. Procedural History**

2           Dana filed this action on September 28, 2015, seeking to represent herself and other  
3           similarly situated consumers who purchased Hershey chocolate products in the last four years.  
4           See generally Compl. Dana's counsel also represents plaintiffs who filed similar actions against  
5           two other large chocolate manufacturers, Mars and Nestlé. See *Hodsdon v. Mars, Inc.*, No. 3:15-  
6           cv-04450-RS (N.D. Cal.); *McCoy v. Nestlé USA, Inc.*, No. 3:15-cv-04451 (N.D. Cal.). Defendants  
7           moved to dismiss in all three cases. Judge Seeborg granted the motion to dismiss in *Hodsdon*, as  
8           discussed in detail below. The undersigned heard argument on the motion in *McCoy* concurrently  
9           with Hershey's motion in the present case.<sup>5</sup>

**10           C. Parties' Arguments**

11           Hershey argues that the case must be dismissed for several reasons, starting with the safe  
12           harbor doctrine, which provides that plaintiffs cannot use California's consumer protection laws to  
13           pursue relief that is foreclosed by other, more specific statutes. Mot. (dkt. 22) at 6–9. According  
14           to Hershey, the California Transparency in Supply Chains Act of 2010 (the "Supply Chains Act")  
15           bars Dana's claims because it regulates disclosures related to labor abuses in supply chains and  
16           does not require the disclosures Dana seeks. *Id.* Dana responds that the Supply Chains Act does  
17           not specifically permit Hershey's omissions or bar Dana's claims, and that the labor violations  
18           addressed by that statute (slavery and human trafficking) do not encompass all of the violations at  
19           issue here (which also include dangerous but non-slave child labor). Opp'n at 5–10.

20           Next, Hershey argues that it has no duty to disclose labor conditions in its supply chain  
21           because the information at issue does not relate to product safety, and because Hershey did not  
22

---

23           <sup>5</sup> Four other cases based on nondisclosure of supply chain labor violations, brought by  
24           plaintiffs who also share counsel with Dana, have been dismissed for failure to state a claim in the  
25           Central District of California. *Wirth v. Mars Inc.*, No. SA CV 15-1470-DOC (KESx), 2016 WL  
26           471234 (C.D. Cal. Feb. 5, 2016); *Barber v. Nestle USA, Inc.*, No. SA CV 15-01364-CJC (AGRx),  
27           2015 WL 9309553 (C.D. Cal. Dec. 9, 2015); *De Rosa v. Tri-Union Seafoods, LLC*, No. CV 15-  
28           7540-CJC (AGRx), 2016 WL 524059 (C.D. Cal. Jan. 15, 2016) (summarily dismissing for the  
          reasons stated in *Barber*); *Hughes v. Big Heart Pet Brands*, No. CV 15-8007-CJC (AGRx), 2016  
          WL 524057 (C.D. Cal. Jan. 15, 2016) (same). Those cases, all of which concern seafood (or pet  
          food that includes seafood products) rather than chocolate, were decided at least in part based on  
          the safe harbor doctrine, which *Hodsdon*, *McCoy*, and this Order decline to reach. The four  
          Central District cases are presently pending on appeal before the Ninth Circuit.

1 have exclusive knowledge, actively conceal the information, make misleading partial  
2 representations, or have a fiduciary relationship with Dana. Mot. at 9–17. Dana contends that the  
3 limitation of the duty to disclose to safety issues only applies in post-warranty product defect  
4 cases, which this is not, and that a duty arises from Hershey’s superior (albeit not actually  
5 exclusive) knowledge of labor abuses in its supply chain. Opp’n at 11–15. She “does not here  
6 contend that Hershey’s partial disclosures give rise to its duty to disclose.” *Id.* at 13 n.58.

7 Turning to Dana’s specific claims, Hershey argues that Dana cannot proceed on a UCL  
8 claim for “unlawful” conduct because her CLRA claim is deficient, nor for “fraudulent” conduct  
9 because such a claim does not encompass omissions absent a duty to disclose. Mot. at 17–18.  
10 Dana responds that her CLRA claim is sufficient to support an “unlawful conduct” UCL claim,  
11 and the “fraudulent conduct” claim should survive because she contends that Hershey did have a  
12 duty to disclose. Opp’n at 17–18. As for “unfair” conduct, Hershey contends that Dana cannot  
13 succeed under any of the tests that courts have used, because she has not identified a legislative  
14 policy against Hershey’s non-disclosure, the non-disclosure at issue is not inherently immoral or  
15 oppressive, and there is no substantial injury to consumers. Mot. at 18–21. Dana argues that the  
16 labor abuses in Hershey’s supply chain contravene legislatively declared policies in the form of  
17 United Nations prohibitions of forced labor and the worst forms of child labor that the United  
18 States has ratified, and that those abuses are immoral and unethical. Opp’n at 18–19. She also  
19 contends that the harm of deceiving consumers outweighs the cost to Hershey of changing its  
20 product labeling. *Id.* at 19–20. Hershey notes in reply that the United Nations sources that Dana  
21 cites relate only to labor practices, not product labeling. Reply (dkt. 30) at 10.

22 Hershey argues that Dana’s CLRA claim fails because Hershey had no duty to disclose,  
23 and also because the omissions regarding labor abuses do not relate to the specific provisions of  
24 the statute Dana cites, which govern representations regarding attributes including the “source,”  
25 “characteristics,” and “standard” of goods. Mot. at 21–22. Dana contends that “Hershey’s failure  
26 to disclose that its supply chain is not child and slave free is likely to deceive a reasonable  
27 consumer regarding the chocolate’s source (from plantations using child and slave labor) and  
28 characteristics/standard (produced by child and slave labor).” Opp’n at 20. Hershey responds that

1 the provisions at issue are intended “to target misrepresentations regarding the identity of the  
2 seller, . . . a product’s physical features or capabilities, . . . or its inherent level of quality or  
3 performance,” not the labor standards used to produce the product. Reply at 12.

4 Hershey does not address Dana’s FAL claim separately in detail, but contends in a footnote  
5 that the FAL only governs affirmative misrepresentations, not omissions. Mot. at 17 n.18. Dana  
6 disputes that proposition and argues that some cases have allowed FAL claims to proceed based  
7 on omissions. Opp’n at 17.

8 According to Hershey, Dana lacks both Article III and statutory standing to bring any of  
9 her claims because she cannot trace the cocoa used in the specific chocolate products she bought  
10 back to a specific plantation, and thus cannot know whether the products she bought were  
11 produced with slave or child labor. Mot. at 22–23. Hershey contends that without that  
12 knowledge, whether the products Dana bought were misrepresented (even under Dana’s theory of  
13 misrepresentation by omission) is uncertain, and if they were not, Dana has not suffered any  
14 cognizable injury. *Id.* Dana responds that her injury and standing arise from misrepresentation of  
15 the supply chain for the chocolate, and if Hershey had better disclosed the labor abuses in the  
16 supply chain, she would not have bought the products regardless of whether she knew the origin of  
17 the cocoa in a specific item. Opp’n at 22. Dana relies on case law holding that a consumer who  
18 purchased or paid more for a product based on misrepresentations has both constitutional and  
19 statutory standing to bring claims under California’s consumer protection laws. Opp’n at 21–22  
20 (citing *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098 (9th Cir. 2013); *Kwikset Corp. v. Superior Court*,  
21 51 Cal. 4th 310, 330 (2011)).

22 Finally, Hershey argues that requiring the labeling Dana seeks would compel speech in  
23 violation of the First Amendment. Mot. at 23–25. Dana contends that laws against misleading  
24 advertising are constitutional, and that a mere rational basis is required to support laws compelling  
25 affirmative factual product labeling to avoid misleading consumers. Opp’n at 23–25 (citing, e.g.,  
26 *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985)). Hershey responds that Dana  
27 has not alleged any misleading affirmative representations that require labeling to redress  
28 consumer confusion, and that the disclosure Dana seeks is not “purely factual and

1 uncontroversial.”” Reply at 14–15 (quoting *Zauderer*, 471 U.S. at 651).

2 **D. *Hodsdon v. Mars, Inc.***

3 In *Hodsdon*, Judge Seeborg granted a motion by chocolate manufacturer Mars, Inc. to  
4 dismiss claims very similar those in the case at hand. *Hodsdon v. Mars, Inc.*, \_\_ F. Supp. 3d \_\_,  
5 No. 15-CV-04450-RS, 2016 WL 627383 (N.D. Cal. Feb. 17, 2016). As a preliminary matter, the  
6 court held that the plaintiff had standing because: (1) “California law permits litigants to pursue  
7 claims under the UCL, CLRA, and FAL if they show . . . that ‘the consumer paid more than he or  
8 she actually valued the product’”; (2) the plaintiff adequately alleged that the use of forced labor in  
9 the supply chain caused him to devalue the product even if he could not prove that forced labor  
10 was used to produce the specific chocolate products that he purchased; and (3) the plaintiff  
11 adequately alleged that he saw the product labels before he purchased the products. *Id.* at \*3  
12 (quoting *Hinojos*, 718 F.3d at 1104). Turning to the merits, however, the court held that the  
13 plaintiff failed to state a claim under California law.

14 With respect to the FAL claim, the court reconciled cases holding that omissions were not  
15 actionable with others that allowed FAL claims based on omissions to proceed, ultimately  
16 determining that omissions accompanying misleading incomplete statements are actionable, but  
17 omissions with no corresponding statements are not. *Id.* at \*4. *Compare Norcia v. Samsung*  
18 *Telecomms. Am.*, LLC, No. 14-CV-00582-JD, 2015 WL 4967247, at \*8 (N.D. Cal. Aug. 20, 2015)  
19 (“There can be no FAL claim where there is no ‘statement’ at all.”), and *Stanwood v. Mary Kay,*  
20 *Inc.*, 941 F. Supp. 2d 1212, 1222 (C.D. Cal. 2012) (same), with *In re Sony Gaming Networks &*  
21 *Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 991 (S.D. Cal. 2014) (denying motion to  
22 dismiss where defendant claimed to have taken steps to secure information but failed to disclose  
23 security deficiencies), and *Tait v. BSH Home Appliances Corp.*, No. SACV 10-00711 DOC  
24 (ANx), 2011 WL 3941387, at \*2 (C.D. Cal. Aug. 31, 2011) (denying a motion to dismiss where  
25 the defendant marketed a washing machine as “sanitary” but failed to disclose its tendency to  
26 accumulate mold). Because the plaintiff in *Hodsdon* “asserted the former type of claim, i.e., that  
27 Mars violated the FAL by failing to issue any statement at all,” the court dismissed the claim.  
28 *Hodsdon*, 2016 WL 627383, at \*4.

1       Next, the court turned to the plaintiff's CLRA claim and his claim under the "unlawful"  
2 prong of the UCL, which was based on the purported CLRA violation. *Id.* at \*5–6. Noting the  
3 Ninth Circuit's holding that "California courts have generally rejected a broad obligation to  
4 disclose," the court looked to whether Mars had any such obligation. *Id.* at \*5. The court held  
5 that despite one case to the contrary, "the overwhelming majority of courts to consider the issue"  
6 have held that omissions are only actionable under the CLRA if they relate to product safety or  
7 defects. *Id.* at \*5–6. Because the omissions at issue related instead to "admittedly horrific labor  
8 practices" in the supply chain, the court dismissed the plaintiff's CLRA claim and the "unlawful  
9 conduct" aspect of the UCL claim that derived from it. *Id.* at \*6.

10       The plaintiff also brought UCL claims based on the "fraudulent" and "unfair" prongs of the  
11 statute. The court followed two California appellate decisions holding that omissions cannot  
12 satisfy the "fraudulent" prong unless there was a duty to disclose, and therefore dismissed that  
13 claim. *Id.* at \*6 (citing *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557  
14 (2007); *Daugherty v. Am. Honda Co.*, 144 Cal. App. 4th 824, 838 (2006)). As for the "unfair"  
15 prong, the court held that the plaintiff's complaint did not satisfy any of the tests used by  
16 California courts to assess such claims: (1) unlike the underlying labor conditions themselves, the  
17 lack of disclosure could not be said to be "'immoral, unethical, oppressive, unscrupulous or  
18 substantially injurious to consumers,'" because the harm was merely the purchase of a chocolate  
19 bar and the information that was absent from the packaging was readily available elsewhere; and  
20 (2) again unlike the underlying labor conditions, the harm from lack of disclosure was not tied to  
21 any established public policy expressed in "'specific constitutional, statutory, or regulatory  
22 provisions.'" *Id.* at \*7 (quoting *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App.  
23 4th 861, 887 (1999); *McVicar v. Goodman Glob., Inc.*, 1 F. Supp. 3d 1044, 1054 (C.D. Cal.  
24 2014)). The court therefore dismissed the UCL claim in its entirety.

25       Because the plaintiff failed to state a claim for the reasons summarized above, the court did  
26 not reach Mars's argument that the Supply Chains Act creates a safe harbor, but expressed doubt  
27 that any such harbor is as broad as Mars contended. *Id.* at \*8–9. The court found that amendment  
28 would be futile and denied leave to amend. *Id.* at \*9. Hodsdon's appeal of Judge Seeborg's

1 decision is currently pending before the Ninth Circuit.

2 **III. ANALYSIS**

3 **A. Legal Standard**

4 A complaint may be dismissed for failure to state a claim on which relief can be granted  
5 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. “The purpose of a motion to dismiss  
6 under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp.  
7 Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the pleading stage  
8 is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that “[a] pleading  
9 which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim  
10 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

11 In ruling on a motion to dismiss under Rule 12(b)(6), the court analyzes the complaint and  
12 takes “all allegations of material fact as true and construe[s] them in the light most favorable to the  
13 non-moving party.” *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).  
14 Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that  
15 would support a valid theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
16 1990). A complaint must “contain either direct or inferential allegations respecting all the material  
17 elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v.  
18 Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,  
19 1106 (7th Cir. 1984)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation  
20 of the elements of a cause of action will not do.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
21 (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked  
22 assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).  
23 Rather, the claim must be “‘plausible on its face,’” meaning that the plaintiff must plead sufficient  
24 factual allegations to “allow[] the court to draw the reasonable inference that the defendant is  
25 liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 570).

26 Rule 9(b) of the Federal Rules of Civil Procedure sets a heightened pleading standard for  
27 claims based on fraud. “In alleging fraud or mistake, a party must state with particularity the  
28 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The Ninth Circuit has held

1 that in order to meet this standard, a “complaint must specify such facts as the times, dates, places,  
2 benefits received, and other details of the alleged fraudulent activity.” *Neubronner v. Milken*, 6  
3 F.3d 666, 672 (9th Cir. 1993); *see also McMaster v. United States*, 731 F.3d 881, 897 (9th Cir.  
4 2013). The heightened standard does not apply to “[m]alice, intent, knowledge, and other  
5 conditions of a person’s mind.” Fed. R. Civ. P. 9(b).

6 Hershey also moves to dismiss under Rule 12(b)(1), apparently on the basis that the Court  
7 lacks jurisdiction because Dana lacks Article III standing. *See* Mot. at ECF p. 2 (Notice of Motion  
8 identifying Rule 12(b)(1) as a basis for dismissal); *id.* at 22–23 (arguing that Dana lacks standing).  
9 Where, as here, a jurisdictional challenge is based on the allegations of a plaintiff’s complaint  
10 rather than on extrinsic evidence, courts “assume [the plaintiff’s] allegations to be true and draw  
11 all reasonable inferences in his favor.” *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).  
12 “[T]he inquiry is therefore much like a Rule 12(b)(6) analysis.” *Animal Legal Def. Fund v. HVFG*  
13 *LLC*, 939 F. Supp. 2d 992, 997 (N.D. Cal. 2013).

#### 14       **B. Standing**

15 Hershey argues that Dana lacks Article III and statutory standing to pursue these claims  
16 because she does not and cannot allege that the specific products she purchased were made from  
17 cocoa produced with the labor abuses at issue in this case—slave labor or the worst forms of child  
18 labor—and therefore fails to allege an actual, particularized injury. Mot. at 22–23; Reply at  
19 12–14. The parties agree that Hershey currently cannot trace the cocoa used in a particular  
20 Hershey chocolate product to a specific plantation, and there is thus no way to know what labor  
21 practices were used in its production. *See* Compl. ¶ 10; Mot. at 22; Reply at 13. Dana argues that  
22 she has standing because she would have either not purchased or paid less for Hershey’s products  
23 if she had known that the *supply chain* involved the labor abuses at issue, regardless of where the  
24 cocoa in a particular chocolate bar originated. Opp’n at 22. Judge Seeborg held that the plaintiff  
25 in *Hodsdon* had standing under similar circumstances, and the Court agrees that Dana has standing  
26 here. *See Hodsdon*, 2016 WL 627383, at \*3.

27       The issue of Article III standing is straightforward. “[W]hen, as here, ‘Plaintiffs contend  
28 that class members paid more for [a product] than they otherwise would have paid, or bought it

1 when they otherwise would not have done so' they have suffered an Article III injury in fact."  
2 *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (quoting *Mazza v. Am. Honda*  
3 *Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012)) (second alteration in original).

4 Dana also has standing under the California statutes at issue. The UCL and FAL require  
5 that private plaintiffs "ha[ve] suffered injury in fact and ha[ve] lost money or property as a result  
6 of the unfair competition" or false advertising. *Hinojos*, 718 F.3d at 1103 (quoting Cal. Bus. &  
7 Prof. Code § 17204 (UCL); citing *id.* § 17535 (FAL)) (alterations in original).<sup>6</sup> In *Hinojos*, the  
8 Ninth Circuit examined the California Supreme Court's decision in *Kwikset Corp. v. Superior*  
9 *Court*, which held that a "consumer who relies on a product label and challenges a  
10 misrepresentation contained therein can satisfy the standing requirement of [the UCL and the  
11 FAL] by alleging . . . that he or she would not have bought the product but for the  
12 misrepresentation," and that "such allegations are sufficient to establish economic injury within  
13 the meaning of [those statutes]." *Id.* at 1105 (quoting *Kwikset*, 51 Cal. 4th 310, 330 (2011))  
14 (ellipsis in original).

15 In both *Kwikset*, where the defendant marketed locks as "Made in U.S.A." despite some  
16 foreign components and assembly work, and *Hinojos*, where the defendant allegedly advertised its  
17 normal prices as "reduced," plaintiffs who relied on those representation had standing to sue under  
18 the UCL and FAL. *Id.* at 1107; *Kwikset*, 51 Cal. 4th at 330. Those courts also listed a number of  
19 other scenarios where a plaintiff's reliance on false advertising could give rise to standing: "meat  
20 falsely labeled as kosher or halal, wine labeled with the wrong region or year, blood diamonds  
21 mislabeled as conflict-free, and goods falsely suggesting they were produced by union labor."  
22 *Hinojos*, 718 F.3d at 1105 (citing *Kwikset*, 51 Cal. 4th at 328–29). Dana's claim that she would  
23 have paid less for (or declined to purchase) Hershey's products but for Hershey's  
24 misrepresentations of the labor practices in its supply chain fits well within these examples.

25 The Ninth Circuit's decision in *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009), does

26 \_\_\_\_\_  
27 <sup>6</sup> The CLRA allows a consumer who has suffered "any damage" to sue, and "any plaintiff who  
28 has standing under the UCL's and FAL's 'lost money or property' requirement will, *a fortiori*,  
have suffered 'any damage' for purposes of establishing CLRA standing." *Hinojos*, 718 F.3d at  
1107–08.

1 not deprive Dana of standing. *See* Mot. at 22; Reply at 13 (citing *Birdsong* for the argument that  
 2 Dana lacks standing unless the specific product she purchased was produced by slave labor or  
 3 child labor). In that case, the plaintiffs alleged that Apple violated the UCL by selling iPods that  
 4 were capable of producing dangerous volume levels and thus causing hearing loss. *Id.* at 957.  
 5 The Ninth Circuit affirmed the district court's holding that the plaintiffs failed to show a  
 6 particularized and actual injury sufficient for standing under the UCL—despite the plaintiffs'  
 7 argument that the risk of hearing loss diminished the value of the iPods—in part because “the  
 8 alleged loss in value . . . rests on a hypothetical risk of hearing loss to other consumers who may  
 9 or may not choose to use their iPods in a risky manner,” and the plaintiffs did “not claim that they,  
 10 or anyone else, have suffered or [were] substantially certain to suffer hearing loss from using an  
 11 iPod.” *Id.* at 959–62. Here, in contrast, Dana alleges that the value of the chocolate products was  
 12 diminished because consumers did not wish to support a supply chain that included severe labor  
 13 abuses. The alleged damage was therefore done *by the purchase itself*, not by any contingency  
 14 that might happen after the purchase.<sup>7</sup>

15 Hershey argues, essentially, that a UCL claim based on misrepresentation of labor  
 16 practices can only succeed where a plaintiff is *certain* that the objectionable practice was used to  
 17 produce the specific item that the plaintiff purchased. *See* Reply at 12–13. Stepping back from  
 18 the fact pattern of this case, that argument would dictate that even if Hershey had—  
 19 hypothetically—concealed Ivorian labor conditions from its customers, falsely labeled all of its  
 20 chocolate as certified to be free of child labor, and run a fraudulent national ad campaign touting  
 21 its child-labor-free chocolate, a customer who relied on that false promotion would lack standing  
 22

---

23 <sup>7</sup> Hershey also cites a number of district court cases finding that plaintiff purchasers did not  
 24 have standing merely because products were defective as to *other* purchasers. Mot. at 23 & n.21  
 25 (citing *In re McNeil Consumer Healthcare, Mktg. & Sales Practices Litig.*, No. MDL 2190, 2011  
 26 WL 2802854 (E.D. Pa. July 15, 2011); *Meaunrit v. The Pinnacle Foods Grp., LLC*, No. C 09-  
 27 04555 CW, 2010 WL 1838715 (N.D. Cal. May 5, 2010); *Myers-Armstrong v. Actavis Totowa,*  
 28 *LLC*, No. C 08-04741 WHA, 2009 WL 1082026, (N.D. Cal. Apr. 22, 2009), *aff'd*, 382 F. App'x  
 545 (9th Cir. 2010); *Whitson v. Bumbo*, No. C 07-05597 MHP, 2009 WL 1515597 (N.D. Cal. Apr.  
 16, 2009)). To the extent those cases are consistent with the more recent Ninth Circuit decisions  
 in *Hinojos* and *Mazza*, all of them—like *Birdsong*—involved at most an unrealized risk of future  
 harm, and are not analogous to the case at hand where Dana alleges that failure to disclose ethical  
 practices in the supply chain affected her willingness to purchase and pay for the products.

1 to sue for fraudulent business practices and false advertising so long as some fraction of Hershey's  
 2 cocoa met those descriptions and the customer was unable to tell what labor conditions produced  
 3 the cocoa in the actual product he or she purchased. Such a result would undermine the holding of  
 4 *Hinojos* and *Kwikset*.<sup>8</sup> The difference between that hypothetical scenario and Dana's allegation of  
 5 mere omission is critical to the outcome of the present motion, as discussed in the sections below,  
 6 but it is a difference relevant to the merits of the claims, not to standing.

7       ““For a significant segment of the buying public, labor practices do matter in making  
 8 consumer choices.”” *Kwikset*, 51 Cal. 4th at 329 (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 969  
 9 (2002)). It is plausible that a consumer would place less value on a product produced from a  
 10 supply chain involving severe labor abuses. Dana alleges that she purchased products or paid a  
 11 higher price for them because she was deceived regarding the labor practices in the supply chain.  
 12 That actual, particularized injury is sufficient to establish standing.

13       **C. CLRA Claim**

14       The CLRA prohibits certain enumerated “unfair methods of competition and unfair or  
 15 deceptive acts or practices undertaken by any person in a transaction intended to result or which  
 16 results in the sale or lease of goods or services to any consumer.” Cal. Civ. Code § 1770(a). Dana  
 17 argues that Hershey's failure to disclose labor abuses on its packaging violates subsection (a)(2)  
 18 by “[m]isrepresenting the source” of the chocolate, subsection (a)(5) by “[r]epresenting that goods  
 19 . . . have . . . characteristics . . . which they do not have,” and subsection (a)(7) by “[r]epresenting  
 20 that goods . . . are of a particular standard.” *Id.* § 1770(a)(2), (5), (7); *see* Compl. ¶¶ 88–91; Opp'n  
 21 at 20. In her Opposition, Dana makes clear that these theories are based on “Hershey's omission

---

22  
 23       <sup>8</sup> Similarly, to use some of the examples given in those cases, it would be a bizarre result if  
 24 sellers advertising food as halal or kosher, diamonds as conflict-free, or products as union-made  
 25 could knowingly mix compliant and non-compliant products with impunity so long as there was  
 26 no way for a buyer to trace the specific item he or she purchased back to the source. The Eighth  
 27 Circuit has nevertheless adopted that rule. *See Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025,  
 28 1030–31 (8th Cir. 2014) (holding that customers lacked Article III standing to bring a claim based  
 on allegedly false advertising of a product as using 100% kosher beef, where the plaintiffs could  
 not show that the specific products they purchased contained non-kosher beef). This Court  
 respectfully disagrees with that result. In this Court's view, if a customer has paid a premium for  
 an assurance that a product meets certain standards, and the assurance turns out to be meaningless,  
 the premium that the customer has paid is an actual, personal, particularized injury that is  
 cognizable under Article III. *See Hinojos*, 718 F.3d at 1104.

1 of known child and slave labor in its supply chain,” and that she “does not here contend that  
2 Hershey’s partial misrepresentations give rise to its duty to disclose.” Opp’n at 13 n.58.

3 “[A]lthough a claim may be stated under the CLRA in terms constituting fraudulent  
4 omissions, to be actionable the omission must be contrary to a representation actually made by the  
5 defendant, or an omission of a fact the defendant was obliged to disclose.” *Daugherty v. Am.*  
6 *Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006). “California courts have generally rejected  
7 a broad obligation to disclose . . . .” *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th  
8 Cir. 2012). In *Wilson*, the Ninth Circuit held that, absent affirmative misrepresentations, an  
9 obligation to disclose under California law extends only to matters of product safety. *Id.* at  
10 1141–43 (examining *Daugherty*, 144 Cal. App. 4th at 836, and subsequent decisions); *see also*  
11 *Oestreicher v. Alienware Corp.*, 322 F. App’x 489, 493 (9th Cir. 2009) (unpublished and non-  
12 precedential) (“A manufacturer’s duty [of disclosure] to consumers is limited to its warranty  
13 obligations absent either an affirmative misrepresentation or a safety issue.”).

14 At least one district court decision has limited *Wilson* to cases where a product was  
15 covered by a warranty that expired before the defect became apparent. *Stanwood v. Mary Kay,*  
16 *Inc.*, 941 F. Supp. 2d 1212, 1221 (C.D. Cal. 2012). Central to the Central District’s holding was  
17 its determination that “[t]he Ninth Circuit acknowledged that its requirement of a safety issue does  
18 not necessarily apply outside the products defect context where warranty protections are not  
19 available,” and that *Wilson* “list[ed] cases where a safety issue was not required to trigger a duty to  
20 disclose.” *Id.* (citing *Wilson*, 668 F.3d at 1142). The Court respectfully disagrees with  
21 *Stanwood*’s reading of *Wilson*. The cases listed at the page cited in *Wilson* by *Stanwood* do not  
22 support *Stanwood*’s holding: four cases explicitly based the materiality of an omission at least in  
23 part on whether it related to safety,<sup>9</sup> and the Ninth Circuit characterized the remaining two<sup>10</sup> as

---

24  
25 <sup>9</sup> *O’Shea v. Epson Am., Inc.*, No. CV 09–8063 PSG (CWx), 2011 WL 3299936, at \*7–9  
26 (C.D.Cal. July 29, 2011); *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 987 (N.D. Cal. 2010)  
27 (“[F]or the omission to be material, the failure must pose ‘safety concerns’ . . . .”), *aff’d*, 462 F.  
28 App’x 660 (9th Cir. 2011); *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection*  
*HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010); *Oestreicher v. Alienware*  
*Corp.*, 544 F. Supp. 2d 964, 971 (N.D. Cal. 2008), *aff’d*, 322 F. App’x 489 (9th Cir. 2009); *Falk v.*  
*Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1096 n.\*. (N.D. Cal. 2007) (“Moreover, plaintiffs  
successfully allege that the potential for failed speedometers constitutes a safety hazard.”).

1 having “arguably concerned safety issues.” *Wilson*, 668 F.3d at 1142 & n.2. Accordingly, the  
 2 Court does not agree that *Wilson* is limited to cases where a warranty once existed but has since  
 3 expired. There are cases holding that a manufacturer has a greater duty to disclose defects that  
 4 arise *during* a product’s express warranty period. *E.g.*, *Collins v. eMachines, Inc.*, 202 Cal. App.  
 5 4th 249, 257–58 (2011); *see also* *Wilson*, 668 F.3d at 1142 n.1 (discussing *Tietsworth v. Sears,*  
 6 *Roebuck & Co.*, 720 F. Supp. 2d 1123 (N.D. Cal. 2010)). But there is no allegation that Hershey  
 7 made any warranty of its chocolate products that would be relevant in this case.<sup>11</sup>

8 The Court agrees with Judge Seeborg’s conclusion that the weight of authority limits a  
 9 duty to disclose under the CLRA to issues of product safety, unless disclosure is necessary to  
 10 counter an affirmative misrepresentation. *See Hodsdon*, 2016 WL 627383, at \*6 (declining to  
 11 follow *Stanwood* in light of “overwhelming authority to the contrary,” and collecting cases). The  
 12 Court also concludes that a plain reading of *Wilson* governs this case, and this “Court is not free to  
 13 deviate from the Ninth Circuit’s construction of California law in *Wilson* absent a subsequent  
 14 interpretation from California’s courts that the interpretation was incorrect.” *Rasmussen v. Apple,*  
 15 *Inc.*, 27 F. Supp. 3d 1027, 1036 (N.D. Cal. 2014) (following *Wilson* despite concluding that its  
 16 basis in California law is “subject to reasonable debate”) (citing *Kona Enters., Inc. v. Estate of*  
 17 *Bishop*, 229 F.3d 887, 884 n.7 (9th Cir. 2000)). Further, the Court agrees with Judge Seeborg and  
 18 Hershey that some bright-line limitation on a manufacturer’s duty to disclose is sound policy,  
 19 given the difficulty of anticipating exactly what information some customers might find material  
 20 to their purchasing decisions and wish to see on product labels. *See Hodsdon*, 2016 WL 627383,  
 21 at \*6 (“[*Stanwood*’s and Dana’s] definition of a material omission has stunning breadth, and could  
 22 leave manufacturers (chocolate or otherwise) little guidance about what information, if any, it  
 23 must disclose to avoid CLRA or UCL liability.”); Mot. at 12–13 (discussing examples of

24  
 25 <sup>10</sup> *Cirulli v. Hyundai Motor Co.*, No. SACV 08-0854 AG (MLGx), 2009 WL 5788762  
 26 (C.D.Cal. June 12, 2009); *Bristow v. Lycoming Engines*, No. CIV. S-06-1947 LKK GGH, 2007  
 27 WL 1106098 (E.D.Cal. Apr. 10, 2007).

28 <sup>11</sup> *Wilson* also acknowledges cases recognizing a broader duty of disclosure in the sale of  
 services, rather than products. *Wilson*, 668 F.3d at 1143 (citing, *e.g.*, *In re Mediscan Research,*  
*Ltd.*, 940 F.2d 558 (9th Cir. 1991)). The chocolate products at issue in the present case are  
 products, not services.

1 consumers making purchasing decisions based on “businesses’ positions on social issues; their  
2 support for or opposition to legislation; their political donations; their environmental record; their  
3 employment practices; and their ties to certain nations or regimes” (footnotes omitted)). There are  
4 countless issues that may be legitimately important to many customers, and the courts are not  
5 suited to determine which should occupy the limited surface area of a chocolate wrapper.

6 A duty to disclose under California law does not extend to all “information [that] may  
7 persuade a consumer to make different purchasing decisions.” *Hodsdon*, 2016 WL 627383, at \*6  
8 (citing *Wirth*, 2016 WL 471234, at \*5–6). Because Dana does not allege any omission of known  
9 dangers to the safety of customers, there is no duty to disclose applicable to this case, and Dana’s  
10 CLRA claim is therefore DISMISSED. A contrary result would create “a broad obligation to  
11 disclose,” which “California courts have generally rejected.” *Wilson*, 668 F.3d at 1141.

12 Even if that were not so, the parties agree Dana would still need to show one of the  
13 following to support a duty to disclose: (1) a fiduciary relationship between Hershey and Dana;  
14 (2) that Hershey had “exclusive knowledge of material facts not known or reasonably accessible  
15 to” its customers; (3) that Hershey actively concealed a material fact; or (4) that Hershey had made  
16 misleading partial representations. Opp’n at 12 (quoting *Doe v. SuccessfulMatch.com*, 70 F. Supp.  
17 3d 1066, 1076 (N.D. Cal. 2014)); Mot. at 9–10. Dana relies solely on the “exclusive knowledge”  
18 test. Opp’n at 13–15. But even if “courts do not apply ‘exclusivity’ with . . . rigidity,” *see*  
19 *Johnson v. Harley-Davidson Motor Co. Grp.*, 285 F.R.D. 573, 583 (E.D. Cal. 2012), it is difficult  
20 to see how *any* definition of “exclusive knowledge” could include a case where, by Dana’s own  
21 allegations: “Hershey acknowledges as it must, the child and slave labor in its Ivorian supply  
22 chain” in its Corporate Social Responsibility Report, Compl. ¶ 21; the industry acknowledged the  
23 issue in the Harkin-Engel Protocol in 2001—more than *ten years* before the statute of limitations  
24 period for Dana’s CLRA claim—and has repeatedly admitted its failure to even develop a  
25 comprehensive certification system in the years since, *id.* ¶¶ 27–31; and in 2006 the United States  
26 Department of Labor commissioned Tulane University to publish reports detailing labor abuses in  
27 the chocolate industry supply chain, *id.* ¶¶ 32–36; among other public disclosures detailed in the  
28 Complaint.

1       Further, even if Dana could adequately plead that Hershey had a duty to disclose the labor  
2       abuses in its supply chain on its product labels, it is far from clear that such information falls  
3       within the categories of representations governed by the CLRA. Dana invokes provisions barring  
4       misrepresentation of the “source,” “characteristics,” and “standard” of a product. Opp’n at 20  
5       (citing Cal. Civ. Code § 1770(a)(2), (5), (7)). While the CLRA provides that it “shall be liberally  
6       construed and applied to promote its underlying purposes” of consumer protection, Cal. Civ. Code  
7       § 1760, it does not explicitly discuss representations regarding labor practices, *see id.* § 1770(a),  
8       and Dana cites no authority holding that any of the enumerated categories she relies on are so  
9       broad as to encompass labor abuses. Because the Court holds that Hershey did not have a duty to  
10      disclose labor abuses in its supply chain on its product labels, the Court declines to resolve  
11      whether misrepresentations regarding labor practices can fall within the scope of the CLRA.

12      **D. UCL Claim**

13       California’s UCL prohibits unfair competition, defined as “any unlawful, unfair, or  
14       fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. Dana brings her claim  
15       under each of these prongs, and Hershey argues that each must be dismissed.

16       The “unlawful” prong of Dana’s Complaint is based solely on Hershey’s purported  
17       violation of the CLRA. Compl. ¶ 74. As discussed above, the Court holds that Dana fails to state  
18       a CLRA claim. Hershey’s Motion is therefore GRANTED as to this prong of Dana’s UCL claim.

19       The “fraudulent” prong fails for similar reasons. As Judge Seeborg noted in *Hodsdon*,  
20       California courts have held that “[a]bsent a duty to disclose, the failure to do so does not support  
21       a claim under the fraudulent prong of the UCL.” *Hodsdon*, 2016 WL 627383, at \*6 (quoting  
22       *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557 (2007)); *see also Daugherty*,  
23       144 Cal. App. 4th at 838 (“We cannot agree that a failure to disclose a fact one has no affirmative  
24       duty to disclose is ‘likely to deceive’ anyone within the meaning of the UCL.”). Because, as  
25       discussed above, the Court holds that Hershey had no affirmative duty to disclose severe labor  
26       abuses in its supply chain on its product labels, Hershey’s Motion is GRANTED as to the  
27       “fraudulent” prong of Dana’s UCL claim.

28       That leaves the “unfair” prong, the test for which remains somewhat unsettled in the

1 California courts. Courts previously held a practice to be ““unfair’ . . . when it offends an  
2 established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or  
3 substantially injurious to consumers.” *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.  
4 App. 4th 861, 886–87 (1999) (citation and internal quotation marks omitted). “This test involves  
5 balancing the harm to the consumer against the utility of the defendant’s practice.” *Lozano v.*  
6 *AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007) (citing *S. Bay*, 72 Cal. App. 4th at  
7 886). The California Supreme Court, however, found that the *South Bay* test was “too amorphous  
8 and provide[d] too little guidance to courts and businesses” in a UCL case between competitors,  
9 and held instead that:

10 When a plaintiff who claims to have suffered injury from a direct  
11 competitor’s “unfair” act or practice invokes section 17200, the  
12 word “unfair” in that section means conduct that threatens an  
13 incipient violation of an antitrust law, or violates the policy or spirit  
14 of one of those laws because its effects are comparable to or the  
15 same as a violation of the law, or otherwise significantly threatens or  
16 harms competition.

17 *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 185, 187. The *Cel-Tech* court  
18 explicitly declined to decide what test applied to actions brought by consumers, as opposed to by  
19 competitors. *Id.* at 197 n.12.

20 In the years since *Cel-Tech*, some courts have continued to use the *South Bay* test for cases  
21 brought by consumers, while others have followed *Cel-Tech*’s lead and “require[d] that the  
22 unfairness be tied to a ‘legislatively declared’ policy,” *Lozanoa v. AT & T Wireless Servs., Inc.*,  
23 504 F.3d 718, 736 (9th Cir. 2007), or in other words, ““that the UCL claim be tethered to specific  
24 constitutional, statutory, or regulatory provisions,”” *Hodsdon*, 2016 WL 627383, at \*7 (quoting  
*McVicar v. Goodman Global, Inc.*, 1 F. Supp. 3d 1044, 1054 (C.D. Cal. 2014)). “Absent guidance  
25 from the California courts about the proper definition of an ‘unfair’ business practice, federal  
26 courts have applied both tests.” *Id.* (citing *Lozano*, 504 F.3d at 736).

27 The “legislative policies” on which Dana relies are the United Nations’ International Labor  
28 Convention No. 182 and the United Nations’ Universal Declaration of Human Rights—the former  
forbidding the worst forms of child labor, the latter forbidding slavery, and both having been  
ratified by the United States. Opp’n at 18–19. The crux of Dana’s claim, however, is not that

1 Hershey utilized slave labor or the worst forms of child labor, but rather that Hershey does not  
2 disclose the existence of those labor abuses in its supply chain on the packaging of its products.  
3 Dana has not identified any legislatively declared policy requiring such disclosure,<sup>12</sup> nor does she  
4 cite any authority for the proposition that where some of a manufacturer's suppliers contravene a  
5 legislatively established policy, it is "unfair" within the meaning of the UCL for the manufacturer  
6 to fail to disclose those violations on its product packaging. The Court declines to make that leap.

7 At the hearing, Dana's counsel suggested for the first time that Dana could amend her  
8 UCL claim to tether the "unfair" prong to the Department of Labor's listing of goods produced  
9 with child labor and forced labor, *see* 22 U.S.C. § 7112(b), and to California's Supply Chains Act,  
10 which is discussed in more detail below in the context of Hershey's safe harbor doctrine argument,  
11 *see* Cal. Civ. Code § 1714.43. Although both statutes call for certain disclosures related to labor  
12 conditions, neither expresses any policy of disclosure on product labels. Amending Dana's  
13 Complaint to reference those statutes would not remedy the defects of her UCL claim.

14 Turning to the *South Bay* balancing test, the distinction between the underlying labor  
15 practices and the failure to disclose once again undermines Dana's claim. The slave labor and  
16 child labor alleged in the Complaint would certainly qualify as "immoral, unethical, oppressive,  
17 [and] unscrupulous." *See S. Bay*, 72 Cal. App. 4th at 887. But can the same be said about the  
18 failure to disclose Hershey's suppliers' labor abuses on Hershey's product packaging?

19 Considering this issue in *Hodson*, Judge Seeborg held as follows:

20 The harm at issue here is that Hodson may not have purchased  
21 Mars's chocolate products at all, or would have paid less for them,  
22 had he been aware of the prospect for child labor in Mars's supply  
23 chain. Such information is, in fact, readily available to consumers on  
24 Mars's website. Given that Hodson, like any other consumer, has  
25 access to information about the source of Mars's cocoa beans, the  
26 absence of such information on the packaging is not "substantially  
27 injurious to consumers" or necessarily immoral. Granting that the  
28 labor practices at issue are immoral, there remains an important  
distinction between them and the actual harm for which Hodson

---

26 <sup>12</sup> While Dana does not argue in the context of the "unfair" prong that either the CLRA or the  
27 FAL constitutes such a policy, her arguments that those statutes compel the disclosure she seeks  
28 could perhaps be transposed to this claim. For the reasons discussed above and below in the  
context of Dana's CLRA and FAL claims, the Court holds that neither statute represents a policy  
requiring the disclosure of labor abuses in a supply chain on product labels.

1            seeks to recover, namely his purchase of Mars's chocolate products  
2            absent any disclosure. Mars's failure to disclose information it had  
3            no duty to disclose in the first place is not substantially injurious,  
              immoral, or unethical, and Hodsdon's UCL claim may therefore not  
              advance.

4            *Hodsdon*, 2016 WL 627383, at \*7. This Court agrees. Because Dana has not adequately alleged a  
5            violation of either test for the "unfair" prong, or a violation of the "unlawful" or "fraudulent"  
6            prongs, her UCL claim is DISMISSED.

7            **E. FAL Claim**

8            The FAL makes it unlawful for any person "to make or disseminate or cause to be made or  
9            disseminated before the public . . . any statement . . . which is untrue or misleading, and which is  
10           known, or which by the exercise of reasonable care should be known, to be untrue or misleading."  
11           Cal. Bus. & Prof. Code § 17500. The plain language of the statute—which prohibits *making*,  
12           *disseminating*, or *causing* the dissemination of false or misleading statements—does not  
13           encompass omissions. Several cases have therefore held that "[t]here can be no FAL claim where  
14           there is no 'statement' at all"—or in other words that an omission, even of material facts, does not  
15           violate the FAL. *Norcia v. Samsung Telecomm. Am., LLC*, No. 14-CV-00582-JD, 2015 WL  
16           4967247, at \*8 (N.D. Cal. Aug. 20, 2015); *see also Hodsdon*, 2016 WL 627383, at \*4; *Stanwood*,  
17           941 F. Supp. 2d at 1222.

18           Dana cites four federal district court cases and two California appellate cases that  
19           purportedly held to the contrary, allowing FAL claims to proceed based on omissions. Opp'n at  
20           17 nn.89 & 91. One of those cases actually dismissed the plaintiff's FAL claim to the extent that  
21           it was based on affirmative misrepresentations, and did not address the FAL claim at all in its  
22           discussion of the plaintiff's fraudulent omission theory. *Elias v. Hewlett-Packard Co.*, 950 F.  
23           Supp. 2d 1123, 1135–36, 1140 (N.D. Cal. 2013) (discussing only the CLRA, UCL, and common  
24           law in the context of fraudulent omissions, and granting leave to amend only as to those claims).  
25           Both of the California cases were based on claims that print, television, and/or telephone  
26           advertising campaigns—which inherently consist of affirmative statements—were misleading for  
27           failure to disclose fees associated with financial products or limitations on the use of coupons.  
28           *People v. JTH Tax, Inc.*, 212 Cal. App. 4th 1219, 1224 (2013) ("The lawsuit claimed there were

1 misleading or deceptive statements in print and television advertising . . . ."); *People v. Toomey*,  
2 157 Cal. App. 3d 1, 17 (1984) ("We encounter little difficulty concluding that Holiday's telephone  
3 solicitations and newspaper advertisements were likely to deceive consumers."). Two of the other  
4 cases, which Judge Seeborg considered in *Hodsdon*, both also involved some degree of affirmative  
5 misrepresentation. *See Hodsdon*, 2016 WL 627383, at \*4. In one, the defendant allegedly  
6 "misrepresented that it would take 'reasonable steps' to secure Plaintiffs' Personal Information  
7 [stored on or transmitted via the defendant's network], and that [it] use[d] industry-standard  
8 encryption to prevent unauthorized access to sensitive financial information," but failed to disclose  
9 that its safeguards were inadequate and network intrusions occurred. *In re Sony Gaming Networks*  
10 & Customer Data Sec. Breach Litig.

11 , 996 F. Supp. 2d 942, 990–91 (S.D. Cal. 2014) (quoting the  
12 plaintiffs' complaint; final alteration in original). In the other case, the defendants advertised their  
13 washing machines as "Xxtra Sanitary" and "high efficiency," but allegedly concealed that the  
14 machines developed mold and were not efficient. *Tait v. BSH Home Appliances Corp.*, No.  
15 SACV 10-00711 DOC (ANx), 2011 WL 3941387, at \*1–3 (C.D. Cal. Aug. 31, 2011). That leaves  
16 only a decision by the Southern District of California, which held without analysis that the FAL's  
17 prohibition of untrue or misleading statements also "requires a duty to disclose" in at least certain  
18 circumstances. *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1192 (S.D. Cal. 2015) (holding  
19 that the plaintiffs plausibly stated a claim under the FAL where the defendant failed to disclose a  
"potentially dangerous substance" in the beverages it sold).

20 Although neither *Sony* nor *Tait* cited the alleged misrepresentations as the reason for  
21 allowing the plaintiffs' omissions claims to proceed, the Court agrees with Judge Seeborg's  
22 conclusion that the outcome in both cases is consistent with a requirement that there be at least  
23 *some* affirmative misrepresentation to support a claim under the FAL. *See Hodsdon*, 2016 WL  
24 627383, at \*4. As for *Cortina*, and also to the extent that any of the other cases discussed above  
25 are not consistent with that rule, the Court respectfully disagrees with their interpretation of the  
26 FAL's statutory language. Because Dana bases her claims on pure omissions, Opp'n at 13 n.58,  
27 she fails to allege that Hershey "ma[d]e or disseminate[d] or cause[d] to be made or disseminated"

1 any false or misleading statement, and thus fails to state a claim under the FAL.<sup>13</sup>

2 **F. Additional Defenses**

3 In light of the holdings above that each of Dana's claims must be dismissed, the Court  
4 need not reach the parties' arguments regarding Hershey's two additional defenses: that the  
5 California legislature has created a "safe harbor" against Dana's claims by enacting the Supply  
6 Chains Act, *see* Mot. at 6–9; and that the relief Dana seeks would compel Hershey's speech in  
7 violation of the First Amendment, *id.* at 23–25. Although this Order need not and does not  
8 resolve either of those issues, the Court briefly addresses the safe harbor argument.

9 "[T]he reach of the UCL is broad, but it is not without limit and may not be used to invade  
10 'safe harbors' provided by other statutes." *Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1125 (2014)  
11 (citing *Cel-Tech*, 20 Cal. 4th at 182). "If the Legislature has permitted certain conduct or  
12 considered a situation and concluded no action should lie, courts may not override that  
13 determination." *Id.* The California Supreme Court has described the scope of the doctrine as  
14 follows:

15 A plaintiff may thus not "plead around" an "absolute bar to relief" simply "by recasting the cause of action as one for unfair  
16 competition." (*Manufacturers Life Ins. Co. v. Superior Court* (1995)  
17 10 Cal. 4th 257, 283, 41 Cal. Rptr. 2d 220, 895 P.2d 56.) The rule  
18 does not, however, prohibit an action under the unfair competition  
19 law merely because some other statute on the subject does not, itself,  
20 provide for the action or prohibit the challenged conduct. To  
21 forestall an action under the unfair competition law, another  
22 provision must actually "bar" the action or clearly permit the  
23 conduct.

24 *Cel-Tech*, 20 Cal. 4th at 182–83; *see also Loeffler*, 58 Cal. 4th at 1125 (emphasizing the  
25 requirement that another statute "clearly permit" the challenged conduct).

26 The Supply Chains Act requires certain large corporations to disclose on their websites  
27 their "efforts to eradicate slavery and human trafficking from [their] direct supply chain[s] for  
28 tangible goods offered for sale." Cal. Civ. Code § 1714.43(a)(1). The statute does not "actually  
bar" any action. *See Cel-Tech*, 20 Cal. 4th at 183. Nor does it "clearly permit" any conduct

---

27 <sup>13</sup> Moreover, even if the FAL allowed claims based on omissions, Dana has not established  
28 any duty to disclose the information at issue, as discussed above in the context of her CLRA  
claim.

1 except disclosure of efforts to eradicate slavery and human trafficking. *See id.*; *Loeffler*, 58 Cal.  
2 4th at 1125. There are also discrepancies between the subject matter of the Supply Chains Act and  
3 the disclosure Dana seeks in this case. As Judge Seeborg noted in *Hodsdon*, the statute “concerns  
4 slavery and human trafficking, not [other forms of abusive] child labor,” and “the legislative  
5 history is silent about whether the legislature contemplated disclosure on labels.” *Hodsdon*, 2016  
6 WL 627383, at \*9. Moreover, there is a difference between, on one hand, advertising the steps a  
7 company has taken to reduce slavery in its supply chain (as the statute requires), and on the other,  
8 disclosing that such slavery persists (as Dana seeks here). That the legislature mandated the  
9 former in certain instances does not necessarily indicate a conclusion that the latter could never be  
10 required under existing consumer protection laws.

11 The Ninth Circuit very recently addressed the safe harbor doctrine in *Ebner v. Fresh, Inc.*,  
12 a case alleging deception where a cosmetic product label disclosed the net weight of the product  
13 contained in a tube but failed to disclose that “only 75% of that product is reasonably accessible.”  
14 *Ebner*, \_\_ F.3d \_\_, No. 13-56644, Slip Op. at 8, 2016 WL 1056088, at \*3 (9th Cir. Mar. 17, 2016).  
15 The panel held that the disclosure of the actual net weight fell within the safe harbor because  
16 “[b]oth federal and California law affirmatively require cosmetic manufacturers to include an  
17 accurate statement of the net weight of included cosmetic product.” *Id.* The plaintiff also brought  
18 an omission claim, however, arguing that failure to explain how much of the product was  
19 accessible rendered the accurate weight disclosure “deceptive and misleading.” *Id.* The panel  
20 held that “[u]nlike a claim seeking to alter the net weight declaration itself, this [omission] claim  
21 does not fall within the safe harbor because there is no law expressly permitting the omission of  
22 supplemental statements.” *Id.* Similarly, here, Hershey has not identified any law “expressly  
23 permitting the omission of” disclosures on product labels regarding slave labor and the worst  
24 forms of child labor in a product’s supply chain. *See id.*

25 The Court recognizes that recent district court decisions have held that the Supply Chains  
26 Act creates a safe harbor against claims based on non-disclosure of labor abuses in a supply chain.  
27 *Wirth*, 2016 WL 471234, at \*6–9; *Barber*, 2015 WL 9309553, at \*2–5; *De Rosa*, 2016 WL  
28 524059 (summarily dismissing for the reasons stated in *Barber*); *Hughes*, 2016 WL 524057

1 (same).<sup>14</sup> Because this Court holds for the reasons stated above that California's consumer  
2 protection laws do not create any obligation to make the disclosures Dana seeks, the question of  
3 whether the Supply Chains Act would shield against such a duty is ultimately moot, and the Court  
4 need not and does not resolve whether *Wirth* and *Barber* are correct or applicable to the case at  
5 hand. The Court nevertheless echoes Judge Seeborg's skepticism that the safe harbor doctrine is  
6 as broad as Hershey contends.

7 **IV. CONCLUSION**

8 For the reasons stated above, Dana's claims under the CLRA, the UCL, and the FAL fail to  
9 state a claim on which relief may be granted, and are therefore DISMISSED. Dana has made clear  
10 that she does not intend to pursue a claim based on affirmative misrepresentations. *See* Opp'n at  
11 13 n.58. The Court therefore finds that leave to amend would be futile, and dismisses this action  
12 with prejudice.

13 **IT IS SO ORDERED.**

14 Dated: March 29, 2016

15   
16 JOSEPH C. SPERO  
17 Chief Magistrate Judge

28 <sup>14</sup> Appeals of all of these cases are currently pending before the Ninth Circuit.